

This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

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AP 8542/07-08 LS

Name

Xx/xx/xx

Date of Birth

04/01/08, 05/28/08, 06/02/08

Dates of Hearing

Closed

Type of Hearing

Parties to the Hearing:

Mr. & Mrs.

Parents' Names

06/09/08

Date Transcript Received

06/20/08

Date Record Closed

Address

07/08/08

Date of Decision

Council Rock

School District

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Newtown, PA 18940
School District Address

Anne L. Carroll, Esq.

Hearing Officer Name

Mr. Mark Klein

School District Superintendent

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Signature of Hearing Officer

I. **BACKGROUND**

The Student involved in this matter is a teenage resident of the School District who will enter high school at the beginning of the 2008/2009 school year. The District agrees that the Student is IDEA eligible by reason of autism, and has provided Student with special education services on that basis, but has never conducted an evaluation of the Student by a District school psychologist. In 2002, the District funded an independent educational evaluation conducted by a psychologist Parents chose.

In February 2006, the District considered a reevaluation, but concluded that it was unnecessary because the Student's IEP team members believed they had sufficient information to continue to provide Student with appropriate special education services. Parents, however, suggested an updated IEE by the same evaluator who had conducted the 2002 evaluation, to which the District agreed in principle. That evaluation did not occur.

Early in 2008, the District determined that additional information was necessary to plan successfully for the Student's transition to high school, and for the required IDEA post high school transition planning. When Parents refused consent for the reevaluation, the District filed a due process complaint, seeking an order that it be permitted to conduct a psycho-educational reevaluation. The appropriateness of the District's proposed reevaluation is the subject of this decision.

A simultaneously issued decision and order concerns Parents' due process complaint alleging that the District reneged on its agreement to fund the independent reevaluation in 2006 and seeking an order that the District be required to provide that IEE and seeking compensatory

education for denial of FAPE based upon the District's alleged failure to assure that a timely reevaluation occurred.

II. FINDINGS OF FACT

1. Student is a teenage child, born xx/xx/xx. Student is a resident of the Council Rock School District and is eligible for special education services. (Stipulation, N.T. p. 21).
2. Student has a current diagnosis of Autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 21).
3. During the 2007/2008 school year, Student was an eighth grade student, completing Student's final year in a District middle school. (N.T. pp. 22)
4. Student entered middle school as a 7th grade student in the 2006/2007 school year. Student was identified as a student with some developmental delays, and social, sensory information, speech/language and OT needs. Those were addressed in a fairly extensive IEP from the elementary school, which remained in effect through most of Student's first year in middle school. (N.T. pp. 36, 37)
5. Student's transition from elementary to middle school was quite successful. (N.T. pp. 38; S-5)
6. Upon entering middle school, Student was placed in an itinerant autistic support class, and Student's program/placement continued in 8th grade. Progress reports/report cards and observation indicate that Student was academically successful during Student's two years in middle school. In 7th grade, Student made good progress in language and social skills. Student's ability to focus improved to the point that an incentive system designed to promote improvement in that area was successfully phased out during the fall of 7th grade. (N.T. pp. 38, 39, 41, 74—76, 376--378; S-5; S-6)
7. In 2002, when Student was in third grade, the District agreed to fund an independent educational evaluation which resulted in a report that discussed Student's cognitive strengths and weaknesses in detail and made program recommendations. (N.T. pp. 45, 46; P-3)
8. Although the District agreed to a suggestion by Student's Parents that the District should fund a reevaluation by the same independent evaluator early in 2006, no reevaluation of Student was conducted in 2006, or at any time since the 2002 evaluation, and the District did not issue a permission to reevaluate Student in 2006 or 2007 (N.T. pp. 57, 58, 384, 427 461; P-4, P-5)
9. Early in 2008, Student's IEP team met to discuss Student's transition to high school during the 2008/2009 school year, along with extended school year (ESY) services.

During that meeting, there was some discussion of the type of courses that might be appropriate for Student, which, in turn, led to a discussion of Student's cognitive ability and prompted the middle school special education supervisor to read the 2002 evaluation report, from which she concluded that additional and updated information about Student might be needed to obtain updated information about Student, assess current needs and plan successfully for both the high school years and post high school transition (N.T. pp. 59—63, 81, 114—116, 118, 123, 231, 232; S-7)

10. Subsequently, the special education supervisor consulted members of Student's IEP team and met with the child study team, including the school psychologist, to consider whether a reevaluation was warranted to assess Student's progress in middle school and to plan for high school (N.T. pp. 63, 64, 82, 83, 85, 86, 132, 133, 304, 305)
11. The child study team recommended that the matter be referred to the multi disciplinary team to seek Parents' permission to conduct a reevaluation of Student. (N.T. pp. 65, 284; P-6)
12. The school psychologist spoke directly with the special education supervisor concerning assessments which would be appropriate for a reevaluation of Student, reviewed educational records and selected the assessments for Student's evaluation. (N.T. pp. 221— 223, 226, 265)
13. In gathering information to determine the scope and specific contents of the evaluation, the school psychologist also spoke to various members of Student's IEP team, individually and informally. (N.T. pp. 283, 284, 289, 304, 305)
14. During the evaluation, the District would obtain input from therapists, teachers and other professionals who work with Student, as well as the Parents, in order to get as complete a picture as possible of Student's functioning and needs. (N.T. pp. 126—129, 255, 257, 258, 262, 263)
15. The District school psychologist testified extensively concerning how she would approach the evaluation with Student in terms of building rapport prior to commencing the assessments, completing classroom observations, selecting additional or different assessments/subtests to determine Student's current levels in the areas of cognitive, academic and adaptive functioning, and how the testing sessions would be managed to maximize Student's performance. (N.T. pp. 229—231, 257—261, 271--273)
16. The psychologist also explained in detail the types of instruments, as well as the specific tests, she selected for the evaluation and why. (N.T. pp. 264—272; S-8)
17. The assessment instruments include measures of intellectual potential /cognitive functioning and academic achievement, with instruments selected to identify Student's particular strengths and weaknesses, and Student's level of academic achievement. (N.T. pp. 265--269)

18. The evaluation will also include scales to rate Student's behavior and social/emotional functioning, specifically the Vineland Adaptive Rating scales and the Behavior Assessment Scale for Children, Second Edition (BASC II). Both Vineland rating scales and a BASC scale were used in the 2002 evaluation. (N.T. pp. 269—272; S-8, P-3)
19. Based upon the 2002 independent evaluation report and research they have read, Parents believe that the reevaluation as proposed by the District will result in a misleading picture of Student. Parents are convinced that if standardized test results are reported, specifically a full scale IQ score, the District will underestimate Student's cognitive abilities, resulting in recommending classes below Student's intellectual potential and insufficiently challenging to Student. (N.T. pp. 346, 388, 390, 391--395, 402, 406, 433, 435; P-3)

III. ISSUE

Should the Council Rock School District be permitted to conduct a full psycho-educational evaluation of Student as it proposes?

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Basis for Parents' Objections to the Proposed Evaluation

At the heart of Parents' unwillingness to permit the School District's proposed evaluation is their belief that it is misleading to report a full scale IQ score for an autistic student with serious language deficiencies in that standardized tests assessing cognitive potential which rely heavily upon language do not yield valid results. With respect to Student, specifically, Parents are convinced that full scale IQ scores derived from such language-based tests will grossly underestimate Student's intellectual capacity. FF 19; N.T. pp. 388—391; P-3. Parents are concerned, therefore, that if the District is permitted to conduct its proposed evaluation, including intelligence testing, and permitted to report full scale IQ scores, it will use the information to propose a program for Student that will be inappropriate given Student's true intellectual abilities. More specifically, Parents believe that the District plans to use the low full scale IQ score, which they believe will surely result from the District's evaluation, to prevent Student from participating in high school classes in which Student is interested based upon an

erroneous view that such classes are beyond Student's intellectual capacity. *See* N.T. pp. 392--395

In addition to these substantive issues based upon the standardized tests the District proposes to use, Parents raised procedural issues concerning the contents of the District's permission to reevaluate (PTR) which the Parents rejected. Parents believe that the District should not be permitted to proceed with the evaluation in that the permission to reevaluate (PTR) issued on February 1, 2008 does not comply with regulatory requirements because it does not specifically list the tests that the District intends to use. Parents also contend that the District's PTR misrepresented the basis for seeking the reevaluation as a request by Student's IEP team for additional information, when the entire IEP team—including the Parents—did not meet to discuss the need for a reevaluation. *See* Parents Closing Arguments pp. 1, 2; N.T. pp. 410—412.

Finally, Parents argue that because the IDEA regulations provide for reevaluation of eligible students every three years, the District should have requested a reevaluation in 2005, three years after the 2002 evaluation. Parents further contend that the District's claim for relief in this case, a request for an order permitting a psycho-educational evaluation of Student by the District, is barred by the two year limitation on due process complaints. Parents' Closing Arguments pp. 3, 4.

Parents conclude that these alleged deficiencies violated IDEA procedural safeguards and, therefore, should preclude the evaluation requested by the District.

B. Procedural Issues

As explained to Parents on the record when the issue of the sufficiency and procedural propriety of the PTR was raised at the due process hearing as a basis for dismissing the District's

evaluation request before taking any testimony, the PTR is not at issue in this case. N.T. pp. 13—15. The only issue to be determined is whether the District’s proposed evaluation as described in the hearing record is appropriate. There is no basis in the IDEA statute and regulations for denying a substantively appropriate evaluation based upon procedural deficiencies.

In an analogous case, a hearing officer concluded that a school district violated IDEA procedural requirements by failing to timely issue a permission to evaluate and awarded compensatory education to the student based upon that violation. When the decision was reviewed in the U.S. District Court for the Eastern District of Pennsylvania, the judge agreed that the district had taken “an unduly long time to complete its evaluation.” *Michael P. and Rita P. v. West Chester Area School District*, 2008 U.S. Dist LEXIS 42536 (E.D. Pa. May 30, 2008) at *52, 53. Nevertheless, looking to the IDEA regulations and other court decisions, the judge concluded that compensatory education could not properly be awarded for “a procedural violation alone” where “the evaluation and the IEP were substantively appropriate.” *Id.* at *53. Although this case does not involve an award of compensatory education, the same principle applies here: IDEA does not impose consequences on a school district for procedural violations when neither the student’s right to a free, appropriate public education (FAPE) nor the parents’ right to participate in the process was seriously impacted. 34 C.F.R. §300.513(a)(1), (2).

Parents no doubt believe that their right to participate in the process of determining whether an evaluation should occur was adversely affected, since they contend that in issuing the PTR and requesting a due process hearing, the District failed to follow IDEA procedural safeguards. In general, however, IDEA procedural safeguards are designed to assure that school districts cannot unilaterally override parental objections to a proposed action, but IDEA does not

often give parents an automatic veto over district actions with which they disagree, and therefore, refuse to consent.¹ The due process hearing requested by the District to obtain an order permitting it to conduct an evaluation of Student is an integral part of the procedural safeguards the IDEA affords to parents.² With respect to consent for reevaluations, specifically, the regulations provide that “If the parent refuses to consent to the reevaluation, the public agency [school district] may, but is not required to pursue the reevaluation by using the consent override procedures described” with respect to parental refusal to consent to an initial evaluation, *i.e.*, a due process hearing. 34 C.F.R. §300.300(a)(3)(i), (c)(1)(ii).

Here, the District followed the appropriate procedures by issuing a PTR pursuant to §300.300(a)(1), (c)(1). (P-7) Regardless of the procedural or substantive appropriateness of the PTR, Parents had the option to, and did, withhold their consent. At that point, the District requested a due process hearing, in which the Parents had a full opportunity to participate, including cross examining the District’s witnesses, presenting their own evidence and raising both procedural and substantive objections to the District’s proposed evaluations. Through this process, Parents have been afforded all procedural safeguards required by the IDEA statute and regulations. Parents, therefore, cannot prevent the District’s proposed reevaluation of Student by reason of their allegations of procedural deficiencies in the District’s PTR.

¹ School districts have no recourse to due process procedures when parents refuse to consent to the initial provision of special education services to an eligible student. 34 C.F.R. §300.300(b)(3).

² Subpart E of the IDEA regulations, beginning with 34 C.F.R. §300.500 is entitled “Procedural Safeguards” and includes all of the procedures designed to construct and protect an appropriate balance of power between parents and school districts. That part of the IDEA regulations begins with the opportunity for parents to examine an eligible child’s education records (§300.501) and ends with procedures for a due process hearing and recovering attorneys fees (§§300.507—517). The resolution process which begins with the filing of a due process complaint and provides for a thirty day period during which the parties are provided an opportunity to meet to discuss the complaint and the underlying facts in order to explore amicable resolution of the dispute, is specifically included in the Procedural Safeguards section of the regulations §300.510.

Finally, the Parents' argument for dismissal of the District's due process complaint/claim for relief as time barred is not well taken. The reevaluation provisions of the regulations do not provide that a school district may only seek parent's consent for a reevaluation every three years and do not preclude a district from seeking an order for a reevaluation through due process procedures if it does not request a hearing within two years after the three year reevaluation "due date." As long as a district does not attempt to reevaluate an eligible student more than once a year (unless parents agree), a district "must ensure" that a reevaluation is conducted "whenever conditions warrant." The one year and three year periods provide the limits of the reevaluation timeframe, provided, however, that the parties may agree that a reevaluation is not necessary when the three year benchmark date arrives. 34 C.F.R. §300.303(a)(1), (b)(1),(2). On the other hand, in accordance with §300.300(c)(1)(ii), if parents refuse to consent to a reevaluation proposed by a district, it is not required to pursue a due process hearing to obtain an order for a reevaluation, although it may do so.

Finally, the IDEA limitation period for requesting a due process hearing explicitly applies to a hearing based upon "a violation that occurred not more than two years before the date" the party requesting the hearing "knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. §300.507(a)(2). Here, the due process hearing request is not based upon a violation, but upon the explicit permission granted to school districts by the regulations to seek a due process hearing to override parents' refusal to consent to a reevaluation. Even assuming that the two year timeline would apply to each District complaint requesting override of a refusal to consent, there is no evidence that a PTR was issued by the District and refused by Parents before February 1, 2008. (FF 8) The District's request for a due

process hearing occurred within weeks of the Parents' refusal to consent to the proposed evaluation, and, therefore, was timely.

C. Substantive Appropriateness of the District's Proposed Evaluation

Pursuant to 34 C.F.R. §300.303, the District's proposed reevaluation must be conducted in accordance with §§300.304—300.311. The District, therefore, is required to 1) “use a variety of assessment tools;” 2) “gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child's special education and related service needs” and provide “relevant information that directly assists” in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). A reevaluation must also include: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special

education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2).

The District's proposed evaluation was described in detail at the due process hearing by the school psychologist who covers the middle school Student attended through the end of the 2007/2008 school year. N.T. p. 215; FF 14—18. The hearing testimony established that she would conduct the evaluation of Student and that she selected the instruments and measures proposed after review of Student's records and discussions with Student's teachers and District therapists who worked with Student. N.T. p. 255; FF 12, 13.

The evaluation proposed by the District includes comprehensive cognitive and achievement testing that will assist the IEP team in determining how successful Student's past program has been and Student's most important current needs, as well as to determine the kinds of high school classes Student should take and the accommodations, if any, necessary for Student to make meaningful progress. Based upon the credible testimony of the District school psychologist who will conduct the reevaluation, there is every reason to believe that she has competently selected appropriate evaluative measures, is able to appropriately analyze the results thereof, and conduct further inquiries and analyses if necessary. Moreover, an evaluation by a District employee is likely to yield extensive and meaningful information based upon observation of Student in the school setting, since she is in the District and readily available to both observe Student's classes and obtain Student's teachers' input with respect to strengths, weaknesses and whether Student's classroom functioning at the time of the observation was typical.

Parents presented their own testimony concerning the reasons they object to the standardized tests the district proposes to use, and in particular, their concerns that reporting a full scale IQ score derived from such instruments will be misleading with respect to Student's cognitive potential, relying upon a journal article and upon the explanation of the Parents' chosen evaluator in the 2002 evaluation report. *See, e.g.*, N.T.pp. 344—350; P-3, p. 15. In the 2002 evaluation report, the evaluator explains why standardized IQ scores not reported. Although Parents' concerns with respect to the potential "misuse" of scores derived from language-based testing instruments is certainly understandable, it is ultimately not helpful to exclude information that, when properly used and interpreted, can provide valuable insights into how Student's disabilities affect Student's abilities to express what Student knows. Such information should not be suppressed, discarded or ignored in interpreting standardized test results. It may be that other measures should be used and results reported as well to provide a full picture, but those are matters for discussion between the school psychologist and the Parents and/or the entire IEP team. There is no valid reason, procedurally or substantively, to rigidly preclude expanding the scope of the evaluation if the results of the initial testing indicate that other measures might likewise provide important information. The IDEA processes are meant to be fluid in order to reach the ultimate goal of providing an eligible child with sufficient appropriate educational services which allow the child to make meaningful progress.

In general, reviewing the testimony and exhibits leads to the conclusion that both parties will need to pay more attention to the discussion and interpretation of the 2002 evaluation results-- and focus less on the standardized test scores--in order to determine how much of that discussion remains valid in light of Student's school performance and updated evaluation results when obtained.

It appears that Parents' single-minded focus on the average IQ score derived from the Leiter scale used in the 2002 evaluation caused them to gloss over narrative information in the independent evaluator's report, particularly the statements that "Student demonstrates a complex cognitive profile with patterns of strengths and weaknesses that range from solidly average to cognitively deficient." and "Non-verbal and visual reasoning are in the average range, and Student's significant learning strengths. In contrast, verbal reasoning skills **range from borderline to more significantly deficient, depending upon the amount of visual input added to language based tasks.**" (Emphasis added) P-3 p. 19. In light of this significant interpretive information, describing Student's overall cognitive functioning in terms of one standardized test that yielded an "average" IQ score is just as misleading as determining Student's cognitive abilities based upon a different measure that may place the full scale IQ score in the "borderline" or "deficient" range, as Parents fear. The important point to keep in mind, for both Parents and School District, is the complexity of Student's cognitive functioning as described in the 2002 evaluation report, and determining which, if any, areas might have moved closer to the norm in the intervening years. It is likely, *e.g.*, to be significant to assess Student's current level of reliance on visual cues and imitation to augment understanding in both academic and social settings where Student could not derive meaning from verbal interactions alone due to Student's language difficulties. *See, e.g.*, P-3 pp. 13, 15, 16, 20. Even in light of the 2002 evaluation report, it appears that decisions concerning the kinds of courses Student should take based solely upon the scores of any particular standardized tests could not possibly result in an appropriate program and placement, much less transition planning that will lead to post high school outcomes that are likely to be successful. Rather, careful analysis of all evaluation measures will be necessary, along with consideration of Student's interests and the

performance demands of courses and post high school interests Student might wish to pursue. It would be of no long term benefit to Student to ignore the likelihood of successfully completing courses in which Student would need to rely heavily on Student's weaker areas of cognitive functioning, as well as the level of assistance Student would need to be successful. The purpose of a reevaluation is not to determine what Student might be able to do without the disabilities which have already been identified, but how to educate Student so that Student can overcome the functional deficits arising from Student's disabilities, and/or to determine where and how Student can be successful despite any deficits which may not be entirely remediated. Viewed in that context, it becomes quite obvious that the more information available about Student and Student's current functioning, the more likely it will be that the IEP team can make valid decisions for both Student's current educational program/placement and transition.

Finally, if Parents disagree with the evaluation results and/or the District's interpretation of the results, or with the programming recommendations arising from the ER or the program proposed by the District members of the IEP team, Parents are free to pursue all the procedural remedies provided in the IDEA statute and regulations, including again seeking an IEE based upon their disagreement with the District evaluation. Parents are not, however, permitted to continue seeking an IEE prior to completion of the District evaluation because that issue is being determined in this and the companion evaluation case. In short, Parents may have legitimate concerns and may ultimately be able to prove that the District failed to conduct an appropriate evaluation, failed to interpret the results accurately or otherwise appropriately. At this point, however, they have not provided sufficient evidence to negate the District's reasons for conducting its own reevaluation, or its evidence that it will conduct an appropriate evaluation. Although IDEA provides for parental input in decision-making, it does not provide a mechanism

whereby Parents are entitled to forestall the potential for future programming disputes by unreasonably limiting the amount and kind of information the District is permitted to gather about Student by means of its proposed evaluation. Although Student's Father testified to physical issues that might interfere with obtaining valid results, there is no evidence that Student will be harmed by the evaluation procedures. N.T, pp. 431, 432. The testimony of the District school psychologist concerning the accommodations she would make for Student to assure valid results is sufficient to overcome these concerns. *See* FF 15. In short, the record of this case provides no reason to believe that the evaluation as proposed by the District is not appropriate. If Parents remain concerned that the scope of the evaluation is not broad enough to sufficiently assess all of Student's areas of disabilities once the evaluation report is completed, they are certainly free to request additional assessments. As noted previously, IDEA processes are meant to be flexible. There is nothing to be gained by insisting upon rigid adherence to form. Substance is key—as long as Parents are provided a full opportunity to participate meaningfully in the IDEA processes, the District fulfills its IDEA obligations. Refusing to participate in informal discussions to share and receive information or more formal procedures such as resolution meetings is counterproductive.

Finally, I will address one other matter, although it arose only tangentially in these proceedings. The joint record of this and the companion evaluation case established that Parents precluded the District's school psychologist from participating in Student's IEP meetings but does not disclose the basis for that action, or, indeed, whether the Parents objected to the inclusion of this particular school psychologist, or to the inclusion of any school psychologist. It should be noted, however, that in selecting the IEP team, the District is permitted to designate an individual with the expertise to interpret evaluation data, and that could certainly be a school

psychologist. *See* 34 C.F.R. §300.321(a)(5). Although the issue of the school psychologist's participation in Student's IEP meetings is not involved in the current decisions, as a matter of dicta, and perhaps, preview, I note for the benefit of both Parents and Districts, that I have found no basis in the IDEA statute and regulations which supports Parents' precluding a school psychologist designated by the District, in general or in particular, from participating in IEP meetings, and especially, in a meeting where the results of an evaluation will be presented.

Efforts by either Parents or the District to limit the attendance at IEP meetings of persons who, by reason of professional training and expertise, might be able to provide insight and assistance with respect to the interpretation of evaluation results and provide programming recommendations is inconsistent with IDEA principles, which promote true sharing and exchange of information concerning an eligible child.

For all of the reasons discussed above, the District will be permitted to conduct the reevaluation of Student as proposed and described in S-8 and in greater detail on the record of the due process hearing.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Council Rock School District hereby **ORDERED** to conduct a reevaluation of Student in accordance with the substantive provisions of the IDEA statute and regulations and with the description thereof provided by the District school psychologist in her testimony at the due process hearing concerning this matter.

Dated: 07/08/08

Anne L. Carroll

Anne L. Carroll, Esq., Hearing Officer